

Supreme Court, U.S.

FILED

OCT 31 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-538

IN THE
Supreme Court of the United States

October Term, 1989

EDNA EMERSON LITTLEWOLF, ET AL.,

Petitioners,

vs.

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF RESPONDENT STATE OF
MINNESOTA IN OPPOSITION TO
CERTIORARI**

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

JAMES M. SCHOESSLER

Counsel of Record

Assistant Attorney General

WILLIAM A. SZOTKOWSKI

Special Assistant

Attorney General

Suite 200, 520 Lafayette Road

St. Paul, Minnesota 55155

Telephone: (612) 296-0693

Attorneys for State of Minnesota



QUESTIONS PRESENTED FOR REVIEW

In 1986, Congress passed an act designed to settle a bitter and unresolved Indian land claims controversy within the White Earth Indian Reservation in Minnesota. The act cleared clouded land titles, provided a period of time within which land claims lawsuits could be brought and provided compensation to potential plaintiffs who did not bring lawsuits. The question presented is:

1. Whether this act, on its face, is within the constitutional authority of Congress to enact, or whether it violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

| | Page |
|-------------------------------------------------------------------------------------------------------------------------------|------|
| Table of Authorities | iv |
| Questions Presented for Review | i |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 6 |
| I. WELSA is Fully Consistent With Prior Congressional Land Claims Settlement Statutes | 6 |
| II. WELSA is Consistent With Judicial Recommendations With Regard to Complex Indian Land Claims Matters | 7 |
| III. This Case Involves No Conflicts Among Courts .. | 8 |
| IV. The White Earth Land Issue is Not of National Significance | 8 |
| V. The Holdings of the Courts Below Were Correct, Reasonable, and Supportable on Several Grounds | 9 |
| A. Petitioners Could Not Overcome the Strong Presumption of Constitutionality of a Congressional Act | 9 |
| B. The WELSA Valuation of Marginal Legal Claims Comports Fully With Just Compensation Requirements | 9 |
| C. The Availability of a Reasonable Statute of Limitations Period Within Which to Bring Lawsuits Makes Compensation Under the | |

| | Page |
|----------------------------------------------------------------------------------------------------|------|
| Fifth Amendment Unnecessary in Any Event | 11 |
| D. The WELSA Compensation is a Constitutional "Alternative Remedy" to Land Claims Litigation | 12 |
| E. The Tucker Act Remedy Satisfies All Relevant Constitutional Requirements | 12 |
| F. WELSA's Compensation Meets Constitutional Due Process Standards | 14 |
| Conclusion | 16 |

TABLE OF AUTHORITIES

| | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Federal Decisions:</i> | |
| Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) | 12 |
| Bordeaux v. Hunt, 621 F. Supp. 637 (D. S.D. 1985), <i>aff'd</i> , 809 F.2d 1317 (8th Cir.), <i>cert. denied</i> , — U.S. —, 108 S. Ct. 147 (1987) | 4, 7 |
| Covelo Indian Community v. Watt, 551 F. Supp. 366 (D. D.C. 1982) | 8 |
| Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) | 9 |
| DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983) | 11 |
| Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) | 12 |
| Fineday v. United States, Civ. No. 6-88-18, slip op. (D. Minn. Jan. 10, 1989) | 4 |
| Fort Berthhold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968) | 10 |
| Gibbes v. Zimmerman, 290 U.S. 326 (1933) | 12 |
| Goddard v. Frazier, 156 F.2d 938 (10th Cir.), <i>cert. denied</i> , 329 U.S. 765 (1946) | 15 |
| Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) | 9 |
| Manypenny v. United States, Civ. No. 4-86-770, slip op. (D. Minn. Feb. 16, 1988) | 4 |
| Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) | 9 |
| Mattingly v. District of Columbia, 97 U.S. 1098 (1878) | 15 |

| | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| McElroy v. Pegg, 167 F.2d 668 (10th Cir.), cert. denied, 335 U.S. 817 (1948) | 15 |
| Nichols v. Rysavy, 610 F. Supp. 1245 (D. S.D. 1985), aff'd, 809 F.2d 1317 (8th Cir.), cert. denied, — U.S. —, 108 S. Ct. 147 (1987) | 4, 7 |
| Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) | 9 |
| Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977), aff'd, 719 F.2d 525 (2d Cir. 1983), aff'd in part, rev'd in part, 470 U.S. 226 (1985) | 7 |
| Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) | 13 |
| Rostker v. Goldberg, 453 U.S. 57 (1981) | 9 |
| Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) | 13 |
| Terry v. Anderson, 95 U.S. 628 (1877) | 11 |
| Turner v. New York, 168 U.S. 90 (1897) | 11 |
| United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir. 1980) | 15 |
| United States v. Locke, 471 U.S. 84 (1985) | 11 |
| United States v. Mottaz, 476 U.S. 834 (1986) | 4 |
| United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) | 10 |

| | Page |
|--------------------------------------------------------------------------------------------------------------|---------------|
| Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) | 9 |
| Wilson v. Isemlinger, 185 U.S. 55 (1902) | 11 |
| <i>Decisions of Other Jurisdictions:</i> | |
| Minnesota v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), <i>cert. denied</i> , 436 U.S. 917 (1978) | 4 |
| <i>Federal Statutes:</i> | |
| Burke Act of 1906, 34 Stat. 182 | 3 |
| Clapp Amendments of 1906 and 1907, 34 Stat. 325 and 34 Stat. 1034 | 3 |
| Dawes General Allotment Act of 1887, 24 Stat. 389 | 3 |
| Florida Indian Land Claims Settlement Act, 25 U.S.C. §§ 1741-1749 | 7 |
| Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 | 6 |
| Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. §§ 1751-1760 | 6 |
| Nelson Allotment Act of 1889, 25 Stat. 642 | 3 |
| Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716 | 7 |
| Tucker Act, 28 U.S.C. § 1491 | 12, 13, 14 |
| White Earth Reservation Land Settlement Act, 100 Stat. 61 | <i>passim</i> |

IN THE
Supreme Court of the United States

October Term, 1989

No. 89-538

EDNA EMERSON LITTLEWOLF, ET AL.,

Petitioners,

vs.

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT STATE OF
MINNESOTA IN OPPOSITION TO
CERTIORARI

STATEMENT OF THE CASE

This appeal involves a third attempt by the plaintiffs/petitioners to have the White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61, (hereinafter "WELSA") declared unconstitutional. The first two attempts, in the United States District Court for the District of Columbia and in the United States Court of Appeals for the District of Columbia Circuit, were firmly rejected by both courts without dissent. The courts below found WELSA constitutional on a number of different grounds, each independent of the other.

Minnesota takes exception to the petitioners' Statement of the Case. Petitioners' statement is filled with such highly opinionated rhetoric and conclusory legal statements as to make it little more than thinly disguised argument. Additionally, petitioners fail to mention at all most of the factors relevant to Congress' consideration and passage of WELSA. A far more objective statement of the factors underlying this controversy and Congress' reaction to it may be found in either the district court or court of appeals opinion below. Minnesota will add here a few further details that should be emphasized for a proper understanding of the issues in this case.

The details of the political, legal, and social history of the White Earth Reservation, though interesting, are of limited importance to this case. What is important, as all parties readily acknowledge, is the fact that such history is extensive, complex, and unique. It is further important to understand that the history of White Earth, and past federal statutes and policies affecting White Earth, were examined extensively in congressional hearings, testimony, and debate during the four years (including four separate extensive congressional hearings) that settlement legislation was considered by Congress.

For purposes of analyzing the current Petition for Certiorari, Minnesota suggests that the following background information is of most relevance.

1. The claims to land that gave rise to WELSA have achieved enough publicity and notoriety to make it virtually impossible for the record title holders to over 100,000 acres of land to engage in any kind of land transactions. Much of the publicity came from the local office of the Bureau of Indian Affairs, which publicized claims theories and sent letters to landowners suggesting that their land titles were not valid. Titles became clouded because of the unsettled and public nature of the controversy, not because the claims theories had been held to be legally valid.

2. The theories behind the claims involve mostly laws, policies, and land transactions that are several decades old, some going back to the late 1800's. The theories implicate the Dawes General Allotment Act of 1887 (24 Stat. 389); the Nelson Allotment Act of 1889 (25 Stat. 642); the so-called Clapp Amendments of 1906 and 1907 (34 Stat. 325 and 34 Stat. 1034); the Burke Act of 1906 (34 Stat. 182); and Executive Branch policies and legal opinions from the early 1900's relating to probates, issuance of patents, and sales of allotments. The claims theories, if accepted, would overturn several decades of statutory law, administrative practice, and landholder expectations. The claims theories (contrary to innuendoes in the Petition for Certiorari) do not involve the issues of fraud and overreaching that were the subjects of hundreds of White Earth federal lawsuits and federal court settlements in the early 1900's.

3. The claims are of uncertain and even tenuous legal validity. They are not, as petitioners continually imply, tantamount to an undisputed legal right to the property itself. The

claims have not been successfully litigated in any federal courts and are subject to strong legal defenses.¹ Individual White Earth land claims brought in 1986 and 1988, prior to the running of the WELSA statute of limitations, have been dismissed in U.S. District Court.² The U.S. Department of Justice did not deem the theories to be of enough merit to initiate any litigation based on them. The questionableness of the claims theories also was discussed often during congressional consideration of WELSA, and even the Associate Solicitor for the U.S. Department of the Interior testified that some of the claims theories probably have little merit.³ Only in one very narrowly limited state court case has even one of the land claims theories found support.⁴

¹ See, e.g., *United States v. Mottaz*, 476 U.S. 834 (1986); *Bordeaux v. Hunt*, 621 F. Supp. 637 (D. S.D. 1985), aff'd, 809 F.2d 1317 (8th Cir.), cert. denied, — U.S. —, 108 S. Ct. 147 (1987); *Nichols v. Rysavy*, 610 F. Supp. 1245 (D. S.D. 1985), aff'd, 809 F.2d 1317 (8th Cir.), cert. denied, — U.S. —, 108 S. Ct. 147 (1987).

² *Manypenny v. United States*, Civ. No. 4-86-770, slip op. (D. Minn. Feb. 16, 1988); *Fineday v. United States*, Civ. No. 6-88-18, slip op. (D. Minn. Jan. 10, 1989).

³ White Earth Indian Land Settlement Hearing on S.1396 Before the Select Committee on Indian Affairs United States Senate, 99th Cong. 1st Sess. 223-25 (1985) (Statement of Tim Vollman).

⁴ The one case is *Minnesota v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978). This ruling, which encouraged development of many of the claims theories, was based on a unique set of stipulated facts and was decided on narrow grounds. The court emphatically stated at the conclusion of its ruling (259 N.W.2d at 589) that:

We reach this result based solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting such as, but not limited to, a situation where title to former trust patent property has already been quieted.

Later federal cases have criticized the reasoning of *Zay Zah*. "Bluntly put, *Zay Zah* is clearly wrong." *Bordeaux v. Hunt*, 621 F. Supp. 637, 649 (D. S.D. 1985), aff'd, 809 F.2d 1317 (8th Cir.), cert. denied, — U.S. —, 108 S. Ct. 147 (1987).

4. The claims and resulting title clouds have caused severe tensions and social and economic problems on the reservation. All parties have acknowledged this, and the disruptions on the reservation caused by this land controversy were testified to at length before Congress.

5. Without congressional action, the title problems probably would never go away, or would go away only after extremely long, complex, expensive, bitter, and divisive litigation. Furthermore, it is unlikely that litigation even could be brought on most of the claims, given the expense of litigation, fractionalized interests of individual heirs, uncertainty of results, and the fact that no one knows who many of the heirs of original allottees are. Hence, without congressional action, there would likely be no end to this controversy and its social and economic repercussions.

These are the essential facts that confronted Congress and that were recognized by the courts below. They all have ample basis in testimony and information available to Congress.

In response to this situation Congress passed the White Earth Reservation Land Settlement Act of 1985. The purpose of WELSA is to resolve land ownership uncertainties as equitably as possible, by ratifying past transactions that are now being questioned, and by providing compensation to all allottees and heirs who might argue that they were affected by such ratification. The past transactions which form the basis of the claims theories are identified by category. The Department of the Interior is ordered to identify and track down all allottees and heirs who might have been affected by those past transactions, and thus who might be entitled to compensation under WELSA. The Department of Interior is then ordered to provide such allottees and heirs with compensation based on a formula of the value of the land at the time of the disputed

transaction plus interest at five per centum compounded annually from the time of the transaction. The State of Minnesota is required to contribute money to the United States to assist in WELSA's implementation, and to give 10,000 acres of land to the White Earth Band as part of settlement. In addition to giving compensation to individual allottees and heirs, the United States is obligated to (and subsequently did) appropriate \$6.6 million to the White Earth Band of Chippewa Indians for purposes of economic development. Lawsuits relating to the identified categories of land transactions are barred after passage of a certain length of time after enactment and the fulfillment of certain conditions. (The time period turned out to be approximately two years.) This approach is similar to the approach used by Congress in other recent Indian land claim settlement bills as discussed *infra*.

The issue raised by the petitioners' lawsuit and subsequent appeals is whether Congress violated any applicable constitutional provisions when it fashioned this settlement.

REASONS FOR DENYING THE WRIT

I. WELSA IS FULLY CONSISTENT WITH PRIOR CONGRESSIONAL LAND CLAIMS SETTLEMENT STATUTES.

WELSA follows closely in form and substance other congressional settlements of complex Indian land claims matters. Its purpose is to settle unresolved legal issues. Its findings and land title clearing mechanisms are virtually identical to those found in, for example, the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735; the Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. §§ 1751-1760; the

Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716; and the Florida Indian Land Claims Settlement Act, 25 U.S.C. §§ 1741-1749. To the extent that WELSA differs in some details from these acts, WELSA is more generous in its statute of limitations period and compensation provisions. Thus, far from being an aberration, WELSA's provisions follow a consistent pattern of exercises of congressional judgment in land claims matters.

II. WELSA IS CONSISTENT WITH JUDICIAL RECOMMENDATIONS WITH REGARD TO COMPLEX INDIAN LAND CLAIMS MATTERS.

Judges who have ruled in land claims cases (often *against* Indian plaintiffs) have urged Congress to resolve these matters—as Congress did by enacting WELSA. Chief Judge Bogue of the United States District Court for the District of South Dakota best summarized this attitude when he wrote in an opinion rejecting Indian plaintiffs' claims:

Although this case does not fit the criteria so as to be classified as a political question, the forced fee patent claims cry out for a legislative solution, and not a judicial solution.

Nichols v. Rysavy, 610 F. Supp. 1245, 1254 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 147 (1987). Similar comments were made by judges hearing Indian land claims issues in the cases of *Bordeaux v. Hunt*, 621 F. Supp. 637, 658 (D. S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 147 (1987); *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 531 (N.D.N.Y. 1977), *aff'd*, 719

F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985); and *Covelo Indian Community v. Watt*, 551 F. Supp. 366, 382 (D. D.C. 1982).

Again, far from departing radically from established principles, WELSA does precisely what judges have asked Congress to do in difficult land claims controversies.

III. THIS CASE INVOLVES NO CONFLICTS AMONG COURTS.

The court of appeals decision upholding WELSA is not in direct conflict with any other appellate court decision, and petitioners have not even alleged such. No courts have overturned major congressional land settlement legislation. No courts have ruled that congressional resolution of extremely uncertain causes of action is unconstitutional. In fact, as discussed earlier, WELSA does exactly what the judiciary has asked Congress to do in these situations.

IV. THE WHITE EARTH LAND ISSUE IS NOT OF NATIONAL SIGNIFICANCE.

The White Earth land claims and WELSA, though certainly of vital importance to Minnesota and its citizens (both Indian and non-Indian), are not of national significance. The land involved in WELSA is just within Minnesota. Furthermore, the White Earth Reservation has a unique history and a unique set of laws and statutes applying to it. Consideration by the Supreme Court of this case will not provide meaningful national precedent of any substantial future use.

**V. THE HOLDINGS OF THE COURTS BELOW WERE
CORRECT, REASONABLE, AND SUPPORTABLE ON
SEVERAL GROUNDS.**

A. Petitioners Could Not Overcome the Strong Presumption of Constitutionality of a Congressional Act.

As the courts below noted, there is a strong presumption that acts passed by Congress are constitutional. This is particularly true where Congress specifically analyzes (as it did with WELSA) the constitutional implications of its actions. These presumptions permeate Supreme Court precedent. *See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Marquette Nat'l Bank v. First Omaha Service Corp.*, 439 U.S. 299 (1978). The presumption should become even stronger when Congress is exercising its constitutional authority over Indian affairs. *See, e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903). None of petitioners' arguments and attempts at distinguishing applicable precedent come close to overcoming these basic presumptions.

B. The WELSA Valuation of Marginal Legal Claims Comports Fully With Just Compensation Requirements.

Throughout the litigation of this case, petitioners refused to acknowledge that WELSA is a reasonable and good faith effort to resolve highly uncertain and even legally tenuous potential claims to land. Ample testimony, analysis, and even

court decisions led Congress to this well supported conclusion. What WELSA "took" was not irrefutable rights to property, but highly speculative causes of action. Given that fact, WELSA's compensation formula⁵ is rational and, compared with other Indian settlement acts, even generous. In the only evidence presented to the courts below on the results of WELSA's compensation formula, the figures show that the formula in sample cases can and does yield compensation to heirs that exceeds the entire value of the land at today's prices. Petitioners' consistent statements to the contrary have no basis in the record of this case. There is no constitutional reason to overturn Congress' analysis of the value of the heirs' speculative causes of action. Furthermore, in line with this Court's conclusion in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), it is doubtful that any "taking" at all took place here because Congress made a good faith effort to give Indians full value for the uncertain nature of their claims, thereby transmuting uncertain property claims to money. *See also Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968).

⁵ Section 8(a) of WELSA (A52) provides that compensation is the value of the land at the time of the disputed transaction, minus any moneys actually received by the allottee or heir, plus 5% interest *compounded* annually. The compounding of interest far exceeds the standard simple interest rule used in Claims Court awards and provides substantial added value since many of the disputed transactions occurred 50 or more years ago. Additionally, compensation does not depend on congressional appropriations but automatically becomes a debt of the United States.

C. The Availability of a Reasonable Statute of Limitations Period Within Which to Bring Lawsuits Makes Compensation Under the Fifth Amendment Unnecessary in Any Event.

The need to achieve finality to disputed land claims is axiomatic with any land claims settlement statute. Accordingly, WELSA contains a statute of limitations on bringing lawsuits related to land claims. This Court has long held (and the parties here do not dispute) that if there is a reasonable period of time within which lawsuits can be brought after passage of the statute, then there is no constitutional "taking" problem. *United States v. Locke*, 471 U.S. 84 (1985); *Wilson v. Iseminger*, 185 U.S. 55 (1902); *Terry v. Anderson*, 95 U.S. 628 (1877). WELSA's limitations period was approximately two years. As the district court below analyzed in detail and found (A25-31), such a period is fully in accord with precedent and is reasonable within the context of the potential White Earth causes of action. See, e.g., *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983); *Turner v. New York*, 168 U.S. 90 (1897); *Terry v. Anderson*, 95 U.S. 628 (1877). The existence of an appropriate statute of limitations period in WELSA thus makes it unnecessary constitutionally to provide *any* compensation for causes of action that are cut off, even though Congress chose to include a generous compensation scheme in WELSA anyway. Because WELSA would be constitutionally valid without *any* provisions for compensation, petitioners' attacks on the WELSA compensation provisions are meritless.

D. The WELSA Compensation is a Constitutional "Alternative Remedy" to Land Claims Litigation.

The combination of the WELSA statute of limitations period, compensation formula, and appeals provisions also can be upheld because they provide appropriate alternative forms of relief to potential plaintiffs. The applicable principle was stated by this Court's holding in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 (1978) :

Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

(Footnote omitted.) Similarly here, the WELSA system of litigation rights, compensation, and appeals provides a "reasonably just substitute" for the speculative causes of action that are eliminated. The constitutionality of WELSA also can be upheld on this ground, notwithstanding petitioners' just compensation clause arguments. See also *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933).

E. The Tucker Act Remedy Satisfies All Relevant Constitutional Requirements.

Notwithstanding all the other grounds on which WELSA can be upheld, the opportunity for a plaintiff to obtain a judicial determination about the fairness of compensation via the Tucker Act, 28 U.S.C. § 1491, provides additional con-

stitutional protection for the provisions of WELSA.⁶ Petitioners throughout the litigation tried to argue that the Tucker Act issue should be the focus of judicial inquiry, while ignoring the fact that, given the other constitutional protections inherent in WELSA, consideration of the Tucker Act remedy is not even necessary for constitutional analysis. Nonetheless, Congress added a Tucker Act remedy to the other provisions of WELSA, and this addition provides even further constitutional protection for the settlement.

The petitioners' Tucker Act arguments were dealt with in a straightforward manner by both courts below (A12-14; A38-44), and petitioners have pointed out no monumental errors in the courts' analyses or direct conflicts with other courts' decisions. In short, WELSA specifically allows an opportunity for judicial review of the fairness of any compensation determination. This opportunity may be taken under the Tucker Act, and offers a claimant a chance to present, in a judicial forum, all his compensation arguments. The opportunity for judicial review is all that the Constitution requires.

The analysis of the Tucker Act by the lower courts in this case is consistent with the Supreme Court's holdings in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Petitioners have failed to articulate any practical distinction between the current situation and the situations in those cases, and have failed to cite any authority to justify their proposed legal conclusions. Furthermore, petitioners' rhetoric

⁶ Section 6(d) of WELSA (A51-52) specifically allows the use of the Tucker Act to challenge the constitutional adequacy of the compensation as it applies to a plaintiff's allotment. A plaintiff presumably would have to demonstrate that an actual property interest had been taken from him and that the WELSA-determined compensation was less than due process would require.

about the "delusory" nature of the Tucker Act remedy founders against the rock of reality. As the district court concluded (A41-43) and the court of appeals confirmed (A12-14), WELSA's procedure probably would benefit petitioners more than the traditional Tucker Act procedure by providing more time for presenting a Tucker Act case and a better record to go along with it.

In sum, the Tucker Act issue need never be reached since WELSA can be upheld on any one of a number of other grounds. However, if it is reached, the lower courts' analyses of the Tucker Act and its operation in this case are correct and fully consistent with this Court's precedent. The availability of the Tucker Act remedy preserves the constitutionality of the settlement statute.

F. WELSA's Compensation Meets Constitutional Due Process Standards.

Regardless of the reasons (discussed *supra*) that "just compensation" analysis is not relevant to WELSA, the settlement act's constitutionality is preserved because it meets just compensation standards. WELSA gives compensation based on the fair market value of the land when it actually left Indian hands, and provides *compound* interest thereafter—not the simple interest which normally would apply in taking cases. The petitioners' only complaint with the compensation formula is that fair market value must be determined as of the time of passage of WELSA, and that any other scheme is facially unconstitutional. Petitioners ignore the fact that WELSA's compensation will often yield more than their preferred standard of current value, which makes their argument about facial unconstitutionality initially suspect. How-

ever, beyond that, petitioners fail to recognize the retroactive nature of WELSA. WELSA retroactively ratified past White Earth transactions *effective as of the date of said transfer*. This is fully consistent with what Congress did in other land claims settlement statutes, and is within Congress' power to accomplish. *See Mattingly v. District of Columbia*, 97 U.S. 1098 (1878); *McElroy v. Pegg*, 167 F.2d 668 (10th Cir.), cert. denied, 335 U.S. 817 (1948); *Goddard v. Frazier*, 156 F.2d 938 (10th Cir.), cert. denied, 329 U.S. 765 (1946); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir. 1980). Since past transactions were ratified as of the date of the transfer, it is appropriate, reasonable, and logical to deem the date of taking to have been as of that time—especially since it is undisputed that the land left Indian hands then. The courts below so decided. Should an individual heir wish to argue this point in an appropriate case, there is an opportunity for such heir to obtain judicial review.

CONCLUSION

Granting certiorari in this case would serve no useful purpose. The decisions below were proper, well reasoned, and well within constitutional precedent. They do not conflict directly with decisions of the Supreme Court or other courts. They involve a controversy that is limited to Minnesota and the peculiar facts and legal history surrounding one reservation. They properly recognize the role Congress must play in Indian land claims controversies.

For all of the reasons cited herein, Minnesota urges the Court to deny certiorari in this matter.

Dated: October, 1989.

Respectfully submitted,

HUBERT H. HUMPHREY, III

Attorney General

State of Minnesota

JAMES M. SCHOESSLER

Counsel of Record

Assistant Attorney General

WILLIAM A. SZOTKOWSKI

Special Assistant

Attorney General

Suite 200, 520 Lafayette Road

St. Paul, Minnesota 55155

Telephone: (612) 296-0693

Attorneys for

State of Minnesota

